

**Littler**

May 22, 2023



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**VIA OVERNIGHT COURIER**

David J. Smith, Clerk of Court  
U.S. Court of Appeals for the 11<sup>th</sup> Circuit  
56 Forsyth Street, N.W.  
Atlanta, GA 30303

Re: *Chewy, Inc. v. U.S. Dept. of Labor*  
U.S. Court of Appeals for the 11<sup>th</sup> Circuit, No. 22-11626 —

**PETITIONER CHEWY, INC.'S RULE 28(j) NOTIFICATION**

Dear Mr. Smith:

Pursuant to Fed. R. App. P. 28(j), Petitioner Chewy, Inc. is providing citation from the record based on a question raised during the oral argument held on May 18, 2023. Consistent with Rule 28(j), Petitioner is not making any argument regarding the record citation, and the body of this letter is fewer than 350 words. In addition, consistent with the Local Rule, four copies of this letter have been submitted to the Clerk's Office, and the letter has been served by mail on all counsel of record.

During oral argument on May 18, 2023, the panel asked whether the powered industrial truck (or forklift) involved in the accident impacted or hit the storage racking system at Chewy's facility. During the administrative trial in this matter, the Secretary's witness, Gerard Driscoll (Compliance Safety and Health Officer with the U.S. Dept. of Labor, OSHA), testified that during his investigation he took a photograph labelled Exhibit C-7 [ECF 17, Appendix IV, P. 164-165 of 167].

Mr. Driscoll testified why he took the photograph in Exhibit C-7:

Q: Now, again, Mr. Driscoll, why did you take this photograph?

A: At the time I exposed the photograph, I was focused on the yellow paint on the bottom corner of the forklift just to indicate or to show that there was impact with that yellow bumper of the rack system.

[ECF 17, Appendix I, p. 60 of 242; and p. 47, lines 11-16 of transcript.]



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Mr. Driscoll then testified further what the yellow marks indicated:

Q: Okay. And, again, the yellow marks that you're referring to on the truck itself, what does that indicate to you?

A: It just indicates to me that there was a impact and a brushing of that yellow bumper showing that the forklift did pass that bumper.

[ECF 17, Appendix I, p. 61 of 242; and p. 48: lines 5-10 of transcript].

Sincerely,

*ts/ Thomas M. L. Metzger*

Thomas M. L. Metzger

TMLM/vmce

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